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WM. R. STANSBURY
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. ~~499~~ 103

ALPHA PORTLAND CEMENT COMPANY
Plaintiff-in-Error

against

COMMONWEALTH OF MASSACHUSETTS
Defendant-in-Error

October Term, 1923

No. ~~808~~ 327

ALPHA PORTLAND CEMENT COMPANY
Plaintiff-in-Error

against

COMMONWEALTH OF MASSACHUSETTS
Defendant-in-Error

MOTION TO CONSOLIDATE AND TO ADVANCE

LOUIS H. PORTER
F. CARROLL TAYLOR
JOHN G. PALFREY
Counsel for Plaintiff-in-Error

Appeal Printing Company, 22 Thames Street, New York City

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

No. 402.

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff-in-Error,

against

COMMONWEALTH OF MASSACHUSETTS,
Defendant-in-Error.

OCTOBER TERM, A. D. 1923.

No. 888.

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff-in-Error,

against

COMMONWEALTH OF MASSACHUSETTS,
Defendant-in-Error.

MOTION TO CONSOLIDATE AND ADVANCE.

Now comes Alpha Portland Cement Company, the plaintiff-in-error, and moves this Court

(1) that these two causes be consolidated and heard together, and

(2) that these causes be advanced on the docket and set down for hearing upon a day certain.

STATEMENT OF FACTS.

The writs of error in these cases were brought to review the final judgments of the Supreme Judicial Court of the Commonwealth of Massachusetts dismissing the petitions of plaintiff-in-error. The actions were brought by a foreign corporation to recover taxes assessed against it for the years 1921 and 1922, respectively, on the ground that said taxes were illegally assessed. The actions were brought under the provisions of the Massachusetts statutes. No technical question of practice is involved. The sole question is whether the Massachusetts statute, construed to be applicable to the plaintiff-in-error, is repugnant to the Federal Constitution.

Case 402 was brought to recover the tax paid for the year 1921. Case 888 was brought to recover the tax paid for the year 1922. In both cases the facts were stipulated. The same constitutional questions are raised in this court in both cases.

In case 402 the details of the method of assessment were not shown, and it was stipulated that the amount of the tax was not in dispute. In view of the opinion of the State Court in that case, plaintiff apprehended that it might be contended that the State Court had not in all respects directly construed the statute, and that the condensed, agreed statement of facts left certain ambiguities open.

Case 888 was, therefore, brought, the State Court saying in its opinion:

> "The purpose of bringing the present petition respecting the excise levied for the year succeeding that under investigation in the earlier case apparently is to make certain the view of this court as to

points thought by the petitioner not to have been fully developed there, in order that the Supreme Court of the United States on writs of review may have before it all aspects of the statute."

Case 888 is, therefore, merely an amplification of case 402, and plaintiff-in-error submits that the two cases should be consolidated and heard together.

The agreed facts, briefly, are as follows:

The taxes were imposed under Chapter 63 of the General Laws of Massachusetts, first enacted as Chapter 355 of the Statutes of 1919. This statute imposes an excise tax with respect to the carrying on of business by foreign corporations within the Commonwealth. The excise is measured by two factors:

(1) The value of the corporate excess employed in the Commonwealth, taxed at the rate of five dollars a thousand. Corporate excess is defined as that proportion of the corporation's capital stock that its assets employed in business in Massachusetts bear to its total assets.

(2) A tax at the rate of two and one-half per cent. (2½%) on that portion of the corporation's net income derived from business within the Commonwealth. The proportion is based upon a complicated statutory formula, which involves the relation of tangible assets within and without the state, of salaries and wages paid to employees within and without the state, and of gross sales from the Massachusetts office as compared with gross sales elsewhere.

Plaintiff is engaged in the manufacture and sale of cement, having mills in various parts of the United States.

It has no mill and no store or warehouse in Massachusetts. So far as Massachusetts is concerned, its sole business is the sale in interstate commerce of cement manufactured in New York and Pennsylvania to residents of Massachusetts. It maintains a small sales office in Boston as a means of conducting this interstate commerce.

It is stipulated and expressly found by the State Court that the plaintiff is engaged exclusively in interstate commerce. It has no bank account in Massachusetts, and it is stipulated that its total property in that state consists of office furniture of the value of $573. In case 402 the total tax assessed was $800.06. This was divided—$420.01, tax on corporate excess, which was valued at $84,001.21; and $380.05, tax on net income apportioned to Massachusetts of $15,370. Of the latter amount, approximately eighty per cent. (80%), or $12,730.71, was based upon an allocation of gross sales from the Massachusetts office, $2,609.05 was based upon an allocation of wages to the salesmen making the sales in interstate commerce, and only $30.30 was based upon an allocation of tangible property in the State of Massachusetts.

The corporate excess was determined by allocating as assets engaged in business in Massachusetts, in addition to the tangible assets of $573, that proportion of the corporation's intangible assets that the income previously assigned to Massachusetts bore to the corporation's total income. A large part of the intangibles, of which a portion was thus allocated to Massachusetts, consisted of the stock of subsidiary corporations, holding title to real estate in Pennsylvania, where the Company's largest mills are situated.

The plaintiff-in-error contended that the State of Massachusetts could not constitutionally impose an excise tax

upon it for engaging in an exclusively interstate commerce business, or for maintaining in that state a sales office as a means of conducting such interstate business, and that, therefore, the entire tax was repugnant to the Commerce Clause of the Federal Constitution.

It also contended that aside from the question of classification of the tax, and that if it could be construed as in substance a tax on property, it was equally invalid, both because repugnant to the Commerce Clause and also because the tax was laid upon property and subjects outside the state's taxing jurisdiction, in contravention of the Fourteenth Amendment to the Federal Constitution.

It contended that it could lawfully be taxed by a proper tax on the value of its property in the state, stipulated to be $573, but that that was the only tax that the state could lawfully lay upon it.

The Massachusetts Supreme Judicial Court in both cases expressly recognized that the controversy could only be settled by the Supreme Court of the United States; but in elaborate opinions it sustained the tax as assessed and dismissed the complaints, and thus established the rule that foreign corporations selling goods in interstate commerce to residents of Massachusetts, and, so far as that state is concerned, engaged exclusively in interstate commerce, are subject to tax for the privilege of having a place of business in the state as a means of conducting such interstate commerce.

Under the rule as thus announced, the state is imposing this tax, not only on the plaintiff-in-error, but upon all other corporations similarly situated.

The questions involved, to be presented to the Court for its determination, are these: whether a foreign corporation engaged exclusively in interstate commerce, and

maintaining an office in Massachusetts solely as a means of conducting such commerce, is subject to tax by the State of Massachusetts for the privilege of maintaining that office, and, incidentally, if any tax at all can be imposed, whether the statutory formula does not inevitably impose a tax on property outside the state, in contravention of the Fourteenth Amendment to the Federal Constitution. It is the contention of the plaintiff-in-error that it is immune from any license or excise tax, and that any such tax is invalid under the Commerce Clause (*Cheney Bros.* v. *Mass.*, 246 U. S., 147).

These questions, directly affecting not only the administration of the state revenue, but still more the conduct of interstate commerce, are of grave importance; and we conceive it to be in the pubic interest that these cases should be advanced.

Dated March 21, 1924.

LOUIS H. PORTER,
F. CARROLL TAYLOR,
JOHN G. PALFREY,
Counsel for Plaintiff-in-Error.

To the Attorney-General of the State of Massachusetts:

Sir:

The within motion will be presented to the Court on April 7th, 1924, at the opening of court, or as soon thereafter as counsel can be heard.

Yours, etc.,

LOUIS H. PORTER,
F. CARROLL TAYLOR,
JOHN G. PALFREY,
Counsel for Plaintiff-in-Error.

Due service of the within notice of motion is hereby admitted.

ALEXANDER LINCOLN,
Assistant Attorney-General.